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TO

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

DEFENDANT ORACLE AMERICA, INC.'S OPPOSITION TO OFCCP'S MOTION TO COMPEL AND FOR ORDER SETTING PRODUCTION SCHEDULE

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I. INTRODUCTION

OFCCP's Motion needed to address only one set of issues: the scope and type of employee contact information to be produced, and whether Oracle's employees are entitled to the opportunity to object before their personal, private contact information is turned over to the federal government. That motion would have been seven pages. Instead, OFCCP filled 13 more pages with extraneous briefing inaccurately painting *Oracle* as the party that "defaulted" on its discovery obligations; requesting unreasonable, arbitrary production deadlines; and making irrelevant, inflammatory accusations of privilege waivers. None of these arguments has merit.

Notwithstanding painstaking efforts to divert the Court's attention away from OFCCP's own dilatory conduct in discovery, the undisputed record confirms that ***Oracle and OFCCP have resolved all outstanding disputes related to OFCCP's discovery requests,*** with the sole exception of the parties' disagreement over employee contact information. The same cannot be said of Oracle's discovery requests to OFCCP. Moreover, even though fact discovery continues through January 20, 2018, Oracle has agreed to substantially complete its document production in response to OFCCP's outstanding discovery request by October 15, 2017 – more than three months prior to the court-ordered deadline. OFCCP articulates no reason why it needs this information in September. Oracle, however, has submitted ample evidence demonstrating it needs the additional month to respond to OFCCP's broad and burdensome requests.

OFCCP's motion as to purportedly "required" analyses is a motion to compel nothing. *Before* OFCCP filed its motion, Oracle heeded the Court's advice at the August 14, 2017 teleconference, and amended its responses to these requests and confirmed that notwithstanding Oracle's objections, either no responsive documents exist, or Oracle would produce all responsive documents. Oracle is not withholding any responsive documents on the basis of privilege. Accordingly, there is nothing left to fight about.

Finally, with respect to contact information, OFFCP takes the same arrogant position as it did with the protective order: we are the federal government, and routine, procedural safeguards aimed to protect the rights of others don't apply to us. But the Court should not let OFCCP

trample on the privacy rights of Oracle's employees, and a 20 percent sample of the overall class more than satisfies OFCCP's needs. The Court should deny OFCCP's motion in its entirety.

II. BACKGROUND

On February 10 and 21, 2017, OFCCP propounded on Oracle 92 document production requests. Many of these requests took the improper form of "[s]weeping requests for 'all documents'" encompassing "swaths of both relevant and irrelevant documents." *Life Alert Emergency Response v. Connect America.com LLC*, 2015 WL 12765465, at *7 (C.D. Cal. Jan. 23, 2015); Declaration of J.R. Riddell ("Riddell Decl."), ¶ 4. The overbreadth of OFCCP's requests is even more astounding given that Oracle previously produced to OFCCP extensive amounts of the information sought during its compliance review. *See* Declaration of G. Siniscalco ("Siniscalco Decl."), ¶ 7(b).

A. Any Delay In Discovery Is Due to OFCCP – Not Oracle.

OFCCP goes to great lengths to make Oracle appear dilatory in its document production efforts. Not so. Instead, any delay has been caused by OFCCP—not Oracle. For example:

- Even though its document requests seek extensive amounts of confidential compensation, applicant, hiring, and other private information, OFCCP *refused* to discuss *any* protective order in this case for nearly *four months*, and only begrudgingly agreed to negotiate over a protective order upon instruction from the Court to do so. OFCCP's unreasonable refusal to even discuss a protective order *alone* delayed discovery by nearly four months. *See* Riddell Decl., ¶ 5, Exs. C–E.

- With regard to OFCCP's multiple overbroad requests for emails, Oracle repeatedly offered to discuss search terms and the use of sample periods during the meet and confer process, as well as in its Supplemental and Amended Responses served on July 12, 2017. This invitation went unanswered for weeks, until August 2, 2017, *two days before the Court's deadline* to complete meeting and conferring, when OFCCP finally decided to come to the table with Oracle to discuss search terms and sampling. *See id.*, ¶¶ 6–7, Ex. F.

- OFCCP has demanded the disclosure of private contact information for thousands of Oracle employees, yet has steadfastly refused to negotiate any compromise with respect to such disclosure, either as to the use of a reasonable sample size of employees or the utilization of a notice procedure that would allow employees to assert their rights. *See id.*, ¶ 16, Ex. F.

In addition, until last week, the relevant time period for the scope of Oracle's production of documents and data in response to OFCCP's requests had not been determined by this Court.

Now that the Court has ruled that the relevant time period extends to the date of the hearing, the amount of data and information that Oracle will have to gather and produce in response to OFCCP's already extremely detailed and burdensome requests has multiplied in size; as OFCCP acknowledges in its motion, its requests for data and documents "will cover five years, or five times the compensation data and more than three times the applicant and hiring data that Oracle provided during the compliance review." *See* Mot. at 2.

B. Oracle Has Agreed To Undertake Extremely Burdensome Discovery Efforts, And OFCCP's After-The-Fact Unreasonable Production Schedule Is Untenable.

On June 30, 2017, after questioning nine Oracle witnesses in six cities across the country, OFCCP provided a lengthy and detailed request for specific information from Oracle's databases. *See* Declaration of N. Garcia ("Garcia Decl."), ¶ 7, Ex. 4. Although Oracle agreed to produce the data requested, *it did not agree to any deadline for production.* As Oracle has explained to OFCCP on multiple occasions, compiling the data identified in OFCCP's June 30th letter is no small feat—it has required a team of ten Oracle IT employees to draft and run complex scripts that identify, map, and pull information from a variety of different Oracle databases and modules before verifying and checking the information for quality control. *See* Declaration of L. Zhao ("Zhao Decl."), ¶ 3–11. Oracle has been working diligently on this project for weeks and has expended roughly 360 person hours on the project to date, particularly as it will be relying on this information for its own expert analyses. As Oracle has explained to OFCCP, it has absolutely no motive to delay providing this information and will produce it to OFCCP as soon as it is ready.

Similarly, with respect to emails, Oracle and OFCCP reached agreement on a sample set of emails for Oracle to review, which in total consist of ***more than 82,000 documents***. Riddell Decl., ¶ 8. Once again, this agreement *did not include a production deadline*. *Id.*, Ex. G.

Having obtained from Oracle an agreement to produce the extensive database information and emails, OFCCP now seeks to impose an after-the-fact arbitrary and accelerated schedule for Oracle's production of these documents and data. In light of the foregoing, and as

explained in greater detail below, OFCCP's demands are unreasonable and impossible to meet.

C. In Light of The August 14, 2017 Telephonic Conference, Oracle Agreed To Produce All Responsive Documents Related To "Required Analyses," Or Confirm That None Exist.

OFCCP also moves to compel as to Requests for Production 71, 72, 78, 79, 80, 87, and 88, which seek documents related to "analyses" that OFCCP incorrectly claims Oracle was required to perform. Oracle objected to these requests on multiple grounds, including that they are based on a false premise, call for a legal conclusion, and require Oracle to refer to extraneous regulations to interpret them. Yet as described more fully below in Section III.B, Oracle has supplemented and amended its responses to these requests, and the dispute concerning them has been resolved. Siniscalco Decl., Ex. A. Accordingly, there is nothing to compel.

D. OFCCP Refuses To Negotiate Over The Scope Of Contact Information Requested, And Further Refuses To Engage In A Process To Protect The Privacy Rights Of Thousands Of Oracle's Current And Former Employees.

OFCCP's Request No. 83 seeks contact information including "full name, home address, home phone number, mobile phone number, and home/personal email address" for thousands of current and former employees who worked for Oracle from January 1, 2013 to the present. Garcia Decl., Ex. 2. During the meet and confer process, OFCCP clarified that the affected individuals would be the following HQCA employees and applicants: "females in the Product Development, IT, and Support lines of business; African Americans in the Product Development line of business; Asians in the Product Development line of business; and African Americans, Hispanics, and Whites who applied for positions in the PTI job group but were unsuccessful."

Oracle objected to this request on the grounds that it sought confidential information, was invasive of the privacy rights of individuals who are not a party to the action, and was overly broad, and supported its position with constitutional and case law authority. Nonetheless, after extensive meet and confer efforts, Oracle agreed to a production of contact information for 20 percent of individual contributor (*i.e.*, non-managerial) employees after an appropriate notice procedure permitting the affected individuals to opt-out if they so choose.

OFCCP refused to compromise. As with the protective order, it also refused to discuss

any form of notice to the affected employees that would allow them to assert their privacy interests and opt-out of having their home addresses and home phone numbers provided to OFCCP. Rather, OFCCP took the same meritless position it took with the protective order: we are the federal government, and the regular rules don't apply to us. The process advocated by Oracle, commonly referred to as a *Belaire* notice procedure, is a routine procedure used by state and federal courts before ordering the production of private third party contact information. In objecting to a *Belaire* procedure, OFCCP has made vague references to delay, but the process would not take long—it could be administered through a third party in a matter of a few weeks. In fact, any delay (once again) is OFCCP's fault. If OFCCP had agreed to a compromise when Oracle first offered to produce contact information in July, the *Belaire* process could have been underway or completed by now and OFCCP could already have employee contact information.

Despite Oracle's demonstrated willingness to compromise, OFCCP has insisted upon production of personal phone numbers and emails for 100 percent of the affected individuals (approximately 5,500 people), *including* managing agents and managers who made the very compensation and hiring decisions that are at issue in the case, without any form of notice whatsoever, and even though it will be virtually impossible for OFCCP to interview anywhere near that many individuals.

III. ARGUMENT

A. OFCCP Seeks To Impose An Impossible Deadline For Production Of Documents In Response To Its Vastly Broad Requests.

As an initial matter, OFCCP argues that an accelerated production schedule is necessary because Oracle has somehow "default[ed]" on its production obligations by not producing all of the information requested by OFCCP in March. This premise upon which OFCCP's argument rests is baseless. It completely ignores the numerous genuine disputes between the parties, and further ignores OFCCP's refusal to negotiate over a protective order and uncertainty over the relevant time period for the scope of Oracle's production (both of which required Court intervention to resolve). The notion that Oracle was required to produce all documents

responsive to OFCCP's requests—no matter how broad or burdensome—within twenty-five days without the benefit of a protective order or any guidance as to the relevant time period is simply unsupported by logic or precedent. Courts have approved of rolling productions where the requested data is "enormous." *See Stanislaus Food Prod. Co. v. USS-POSCO Indus.*, 2012 WL 1940662, at *5, *7, n. 7 (E.D. Cal. May 29, 2012) (approving of defendant's document production where it had "produced approximately 22,685 pages (13,363 documents) of email, electronic, and paper, and it continues to produce documents on a rolling basis").

Setting aside that it is wholly misleading to blame Oracle for the purported delay, the important and undisputed facts are as follows: the parties have now reached agreement on *all outstanding disputes with the exception of the scope and process to govern employee contact information.* The parties have reached agreement on Oracle's creation of a so-called "database" of information and the contents therein; and the parties have now agreed upon a sample and search term process by which Oracle will respond to OFCCP's broad email requests. Oracle is working diligently to provide that information, and, as noted in OFCCP's own motion, Oracle has even offered a reasonable production schedule that provides all of the agreed upon outstanding information *within the next two months*. As Oracle has repeatedly explained to OFCCP, the complexity and burden associated with OFCCP's requests makes OFCCP's schedule simply impossible to meet. *See* Zhao Decl., ¶ 11; Riddell Decl., ¶ 13.[1] Conversely, OFCCP has provided no satisfactory explanation as to why almost four full months is not a "sufficient time" to analyze the data, conduct follow-up discovery, and prepare its report. Nevertheless, to the extent the Court is persuaded by this argument, Oracle does not oppose OFCCP's suggestion that the deadlines be extended. *See* Mot. at 6.

OFCCP's claim that Oracle somehow "reneged" on its commitment to provide a privilege

[1] Indeed, OFCCP seeks to impose an October 15, 2017 deadline by when all emails in the case will be produced, even though the parties have not yet met and conferred over potential search terms for emails beyond the agreed upon sample sets. Such a deadline would be arbitrary at best, however, as neither party has any idea as to the number of emails that may be at issue. Nor has Oracle affirmatively agreed that for all of the sample sets, additional productions are warranted. Instead, the parties have agreed to meet and confer further on whether and what additional searches are necessary, based on review of the initial emails produced. *See* Riddell Decl., Ex. G.

log by June 12, 2017 is simply untrue; rather, the reason that Oracle did not produce a privilege log on that date was that at that time, there were no responsive documents being withheld on the basis of privilege. *See* Riddell Decl. ¶ 14. In any event, Oracle is willing to produce one now (again, mooting OFCCP's motion on this point). On the contrary, however, Oracle should *not* be required to declare, under oath, when its production for each RFP is substantially complete. Such a declaration is *not* called for by the Federal Rules of Civil Procedure, and OFCCP has offered no justification for such a drastic and one-sided requirement, especially where, as here, the relevant time period for production goes right up to the hearing date and Oracle will be required to supplement its productions on a regular basis.[2] Moreover, as a practical matter, OFCCP's 92 requests for production seek a vast array of different kinds of information from many different individuals and departments, and it is simply impossible to identify a single person who would be qualified to sign such a declaration.

B. There Is No Dispute Over Oracle's Internal Analyses Because Oracle Has Already Agreed to Produce Any Responsive Analyses.

The dispute concerning OFCCP's requests for Oracle's internal analyses has been resolved. Request Nos. 71, 72, 78, 79, 80, 87, and 88 (collectively, the "Analyses Requests") seek internal pay equity analyses (Nos. 71 and 72), adverse impact analyses (No. 78), validity studies (Nos. 79, 87, and 88), and analysis of total employment process (No. 80) that were "conducted pursuant to" or were "required by" specified federal regulations. Oracle has already agreed to produce all responsive analyses. Siniscalco Decl., ¶ 11, Ex. A. Indeed, OFCCP's motion acknowledges this. Mot. p. 7, n.4. Put simply, there is nothing in the Analyses Requests that Oracle has not agreed to produce. Thus, the Court should deny OFCCP's motion as moot.

Oracle asserted numerous objections to the Analyses Requests. For example, the requests improperly require Oracle to conduct legal analyses to respond and are based on the

[2] For support, OFCCP relies on a court order in *Abraham v. BP Am. Prod. Co.*, No. 1:09-cv-00961 (D.N.M. May 11, 2010), which itself does not cite any authority. Nor could it. As noted above, the Federal Rules do not require verification of responses to document requests. *State Farm Mut. Auto. Ins., v. New Horizont*, 250 F.R.D. 203, 222 (E.D. Pa. 2008) ("Rule 34(b) does not require a party's response to a document request to be verified by the party. Rather, responses to document requests need only be certified by an attorney or unrepresented party.").

false premise that OFCCP regulations require Oracle to perform certain types of analyses. At the August 14, 2017 telephonic hearing regarding the parties' discovery disputes, however, Oracle interpreted the Court's comments as encouraging Oracle to respond to the Analyses Requests, despite its objections, by stating whether Oracle possesses responsive documents to the requests as drafted. Thus, only two days later Oracle amended and supplemented its responses to the Analyses Requests and confirmed that no responsive documents exist with respect to OFCCP Request Nos. 71, 72, 78, 79, 87, and 88. Siniscalco Decl., ¶ 11, Ex. A (8/16/17 EMC letter to OFCCP at 1); Bremer Decl., ¶ 2. Oracle further stated that, notwithstanding its objections, it would produce documents responsive to Request No. 80 that relate to OFCCP's allegations of (i) recruiting and hiring discrimination in the PT 1 job group and (ii) compensation discrimination in the Product Development, Support, and IT lines of business. *Id.*

Those are all the Analyses Requests at issue. There is nothing left to fight about. Yet OFCCP filed this motion anyway, apparently intent on making alarmist claims of prior admissions or waiver of privilege (none of which have merit).

1. Even If Oracle Had Responsive Documents, OFCCP's Requests Are Improper.

OFCCP's Requests (and its Motion) are based on the false premise that Oracle was required by federal regulations to prepare pay equity and the other analyses. To be clear, pay equity analyses are not referenced either in the cited regulation or *any* OFCCP regulation. *See, e.g.*, 41 C.F.R. § 60-2.17; Siniscalco Decl., ¶ 7(c).[3] Nor does OFCCP provide any authority in its motion that pay equity analyses are required by regulation.[4] In reality, OFCCP's requests

[3] Significantly, OFCCP chose not to require "pay equity analyses" under § 60-2.17(b)(3). On June 15, 2016, OFCCP revised its Sex Discrimination Guidelines and included a lengthy discussion regarding compensation discrimination. In response to comments to the proposal, OFCCP made clear it had no intent to dictate the specific method by which contractors had to evaluate their compensation systems under 60-2.17(b)(3). Rather, OFCCP stated that "[e]ach contractor may continue to choose the assessment method that best fits with its workforce and compensation practices." Discrimination on the Basis of Sex, 81 FR 39108-01, at *39126, 2016 WL 3254878 (Final Rule). As part of its regulatory changes OFCCP easily could have required contractors to perform and submit "pay equity analyses" or statistical analysis. Instead OFCCP chose a flexible approach for employers to evaluate their compensation systems.

[4] Despite its repeated assertions that Oracle was required by regulation to create the requested documents, the only authorities it cites are 41 C.F.R. § 60-2.32, which provides that a contractor must provide OFCCP its affirmative action programs, and §§ 60-3.4(A), 3.5 (D), and 3.15, which provide that if a contractor prepares adverse

appear to be an attempt to get Oracle to "admit" that it did not perform a purportedly mandated analysis. Oracle therefore objected to these requests. On August 16, however, heeding the Court's guidance and subject to its objections, Oracle confirmed to OFCCP that it does not have documents responsive to any of these requests except for Request No. 80, to which it has agreed to produce documents.

Oracle's agreement to produce documents responsive to Request No. 80 is significant because it subsumes Request Nos. 71 and 72. Each of these three requests seek analyses done pursuant to 41 C.F.R. § 60-2.17(b). Because pay equity analyses are not required by § 60-2.17(b), Oracle has no documents responsive to Request Nos. 71 and 72. Yet Oracle does have and will produce documents that *are* required by §60-2.17(b) in response to Request No. 80.

OFCCP's other requests similarly misstate the law by suggesting that Oracle is "required" to conduct certain adverse impact analyses and validity studies. Request Nos. 78, 79, 87, and 88 cite to and rely upon the Uniform Guidelines for Employee Selection Procedures, 41 C.F.R. § 60, Part 3, which apply *only* when the employer utilizes a selection procedure within the meaning of the Guidelines. *See* 41 C.F.R. § 60-3.16. There is no selection procedure, such as a test to screen applicants, at issue in this case. Accordingly, Oracle does not have documents responsive to these requests. Again, OFCCP appears to be seeking an admission that Oracle did not conduct an analysis that it was required to do. This effort fails because Oracle was not required to perform these analyses.

2. OFCCP Mischaracterizes The Evidence That It Contends Are "Admissions."

In an effort to manufacture an admission by Oracle that documents responsive to Request Nos. 71 and 72 (pay equity analyses) exist, OFCCP misconstrues two-year-old comments by Shauna Holman-Harries, Oracle's Director of Diversity Compliance, and Lisa Gordon, Oracle's Direction of Compensation. OFCCP claims that Ms. Holman-Harries and Ms. Gordon

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action analyses and validity studies for a selection procedure, it must provide them to OFCCP. *See* Mot. at 10. OFCCP cites to no authority that so much as mentions a "pay equity analysis" or suggests that adverse action analyses or validity studies must be prepared in contexts *not* involving a selection procedure.

"confirmed that Oracle does pay equity analyses." Mot. at 8. In fact, neither Ms. Holman-Harries nor Ms. Gordon said anything about Oracle conducting pay equity analyses *pursuant to OFCCP regulations*, which is what OFCCP's Analyses Requests seek. Rather, Ms. Holman-Harries stated that Oracle conducts pay audits to assess legal compliance with unspecified non-discrimination obligations. Garcia Decl., Ex. 7. Ms. Gordon purportedly said that Oracle does not "do equity studies regularly but may do ad hoc analyses[.]" Garcia Decl., Ex. 9 at 14. And Oracle's counsel, Gary Siniscalco, explained to OFCCP that a proper compensation analysis under Directive 307 would involve a cohort analysis; he did not state that he conducted any pay equity analyses pursuant to 41 C.F.R. § 60-2.17(b). Siniscalco Decl., ¶ 10. Far from being "admissions," the statements of Ms. Holman-Harries, Ms. Gordon, and Mr. Siniscalco actually prove Oracle's point: to the extent Oracle conducted "pay equity analyses," they were not done pursuant to OFCCP regulations and thus are not responsive to OFCCP's requests. Rather, they were for the purpose of obtaining legal advice and are privileged.[5]

In sum, none of OFCCP's evidence demonstrates that Oracle conducted pay equity analyses pursuant to 41 C.F.R. § 60-2.17. OFCCP is contorting the evidence and putting words in Oracle's mouth. OFCCP's contrived "admissions" fail. Oracle has no documents responsive to Request Nos. 71 and 72.

Similarly, OFCCP's claim that Oracle "admitted that it had documents responsive to RFPs 79, 87, and 88" (validation studies) is another canard. The cited evidence consists of one paragraph from an April 2017 meet and confer letter from Oracle addressing 52 of OFCCP's document requests. Garcia Decl., Ex. 15. In that letter, Oracle stated that it would not produce documents in response to those 52 requests due to its stated objections. Those objections included that OFCCP's requests were unclear, falsely assumed Oracle was required to conduct certain analyses, called for a legal conclusion, and referred to external regulations. *Id.* In its

[5] For many reasons, in addition to Oracle's own non-discrimination policies, assessing legal risks is sensible corporate governance and human resource policy, Oracle, like many other companies, regularly seeks advice and assistance from legal counsel to analyze employment decisions, policies and practices. Therefore many analyses are done internally as part of internal oversight programs. OFCCP itself has long recognized and encouraged private audits. Siniscalco Decl. ¶ 7(e).

Motion, OFCCP ignores all of these objections and jumps to the "gotcha" conclusion that Oracle must have responsive documents. When this letter was sent in April 2017, Oracle was resting on its objections. As stated above, at the August 14 hearing Oracle interpreted the Court's comments to mean that Oracle should simply say whether it has documents responsive to the requests as drafted, despite its objections. Oracle followed the Court's guidance and did just that on August 16. It has no documents responsive to Request Nos. 79, 87, or 88.[6]

3. Oracle Did Not Waive Any Privilege Objections.

OFCCP next contends that Oracle waived its privilege objections with respect to the Analyses Requests. The problem with this argument is that Oracle is not withholding any documents responsive to these requests on a claim of privilege. Oracle already told OFCCP this before it filed this motion, as OFCCP acknowledges. Bremer Decl., ¶ 2.

Oracle is not obligated to prove that the attorney-client or work-product privileges apply to some other, non-responsive documents that may exist but that OFCCP has not requested.[7] Likewise, OFCCP's arguments regarding Oracle's privilege log are irrelevant. A party is not required to, and indeed should not, log irrelevant, nonresponsive documents. Fed. R. Civ. Proc. 26(b)(5) (party must prepare privilege log when it "withholds information **otherwise discoverable** by claiming that the information is privileged…") (emphasis added); *Del Socorro Quintero Perez v. United States*, 2016 WL 362508, at *1 (S.D. Cal. Jan. 29, 2016) (referring to counsel "improperly listing irrelevant documents in their privilege log").[8]

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[6] OFCCP does not contend that Oracle admitted that it has documents responsive to Request No. 78.

[7] OFCCP argues in its Motion that documents that are required by regulation are not privileged. Mot. at 10–11. Because Oracle is not withholding on the basis of privilege any responsive documents that are required by regulation, OFCCP's argument is beside the point. As an aside, Oracle notes that OFCCP misstates many of the cases it cites in support of that proposition. For example, OFCCP states that in *OFCCP v. JBS USA Holdings, Inc.*, (ALJ April 22, 2016), the Court compelled production of internal audits "after finding the primary purpose was regulatory compliance." Mot. at 11. To the contrary, the Court in the *JBS* matter found "there is no evidence that such audits were gathered for the purpose of obtaining legal advice regarding the company's compliance with regulatory schemes." 2015-OFC-1 at p. 6.

[8] OFCCP also claims that Oracle's objections, such as relevance or that OFCCP's requests require it to conduct research, interpret regulations, and make legal conclusions are improper. As discussed above, OFCCP's arguments are moot because Oracle has responded and confirmed that it is not withholding responsive documents.

C. Oracle's Proposal Regarding Production of Employee Contact Information Is More Than Sufficient To Meet OFCCP's Needs.

1. Oracle's Employees Have A Protectable Right Of Privacy In Their Personal Contact Information.

OFCCP contends that it is entitled to contact information, including personal phone numbers and emails, for several thousand current and former Oracle employees who have never consented to Oracle disclosing such information, without any form of notice procedure whatsoever. Such a broad and intrusive request should not be granted.

Article I, section 1 of the California Constitution grants individuals a right to privacy, which is essentially "the right to be left alone." *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 16 (1994). "Protection of informational privacy is the provision's central concern," and the privacy right extends to employees' home addresses and other contact information. *Williams v. Superior Court*, 2 Cal. 5th 531, 552 (2017).

In *Belaire-W. Landscape v. Superior Court*, the California Supreme Court confirmed that contact information for current and former employees deserves *heightened* privacy protection because employees give employers their contact information as "a condition of employment," with the expectation it will not be disclosed externally unless required. 149 Cal. App. 4th 554, 561 (2007).[9] The *Belaire* court permitted production of former and current employees' contact information only "following proper notice," and "unless . . . they objected in writing to the disclosure." *Id.* at 562.

OFCCP argues that the Supremacy Clause of the United States Constitution somehow overrides the privacy interests of Oracle's employees because OFCCP is a federal agency. Not

[9] OFCCP attempts to sidestep this consideration by misreading *Belaire* to equate itself with other government agencies, such as the Internal Revenue Service and Social Security Administration, to which disclosure of certain employee information is required. Mot. at 16–17. OFCCP purposefully omits the very next sentence of its citation, which makes clear that *Belaire* was focused on the "reasonable expectation" of employees "in light of employers' usual confidentiality customs and practices," and was not creating an exception for government agencies generally. *Belaire*, 149 Cal. App. 4th, at 561. Clearly there is a distinction in employee's expectations of privacy between government agencies that receive information for *all* employees as a matter of course and an agency engaged in litigation that is seeking personal contact information for specific employees for the express purpose of contacting those employees.

so. None of the cases OFCCP cites in support of its "Supremacy Clause" argument has anything to do with the *Belaire* procedure. Indeed, there is nothing inconsistent with a *Belaire* procedure to be found in federal law and a *Belaire* procedure does not "regulate the federal government." Following OFCCP's flawed logic, *any* procedural requirement imposed by the Court would be an impermissible "regulation of the federal government." That clearly cannot be the case, and is exactly the argument OFCCP made (incorrectly) when refusing to enter into *any* protective order until instructed do to so by this Court.[10]

Even setting aside OFCCP's specious "Supremacy Clause" argument, federal courts also recognize a federally protected right to informational privacy. Specifically, courts in the Ninth Circuit have "recognize[d] a constitutionally-based right of privacy that can be raised in response to discovery requests." *Zuniga v. W. Apartments*, 2014 WL 2599919, at *3 (C.D. Cal. Mar. 25, 2014); *see also Lawrence v. Hoban Mgmt.*, 305 F.R.D. 589, 591–93 (S.D. Cal. 2015) (privacy rights of third parties precluded production of their telephone numbers to plaintiffs); *Stallworth v. Brollini*, 288 F.R.D. 439, 444 (N.D. Cal. 2012) ("The United States Supreme Court has recognized a constitutional right to privacy, more specifically, a constitutional right to nondisclosure of one's personal information."). This informational privacy interest flows from the Supreme Court's discussion in *Whalen v. Roe*, 429 U.S. 589, 599 (1977), where the Court explained that one type of privacy interest protected by the Constitution is "the individual interest in avoiding disclosure of personal matters." *See also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977); *In re Crawford*, 194 F.3d 954, 958–59 (9th Cir. 1999). If anything, principles of comity counsel against an administrative law tribunal ruling against the constitutional privacy interests of third parties by ordering disclosure of their private contact information without any form of notice.

Finally, the importance of ensuring the privacy of Oracle's employees' contact

[10] Indeed, the logical conclusion of OFCCP's argument is that Oracle's current and former employees automatically waived their constitutional right of privacy in their contact information simply by virtue of deciding to work for Oracle, which happens to be a federal contractor defending against claims by OFCCP. Plainly that is not the law.

information is not purely speculative. As Judge Berlin explained in *OFCCP v. Google*, No. 2017-OFC-00004 (July 14, 2017):

> My concern centers on the extent to which the employee contact information, once at OFCCP, will be secure from hacking, OFCCP employee misuse, and similar potential intrusions or disclosures. OFCCP has already collected for 21,114 employees information such as name, date of birth, place of birth, citizenship status, visa status, salary, and stock grants. That information, if hacked or misused, could subject tens of thousands of employees to risk of identity theft, other fraud, or the improper public disclosure of private facts. Adding contact data, such as personal phone numbers and email addresses, increases the risk of harm to Google's employees. The contact information could ease the efforts of malicious hackers or misdirected government employees.
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> [D]ata breaches in 2015 at the Office of Personnel Management resulted in the exposure of private, personally identifiable information . . . for millions of current and former federal employees and applicants for federal employment. Anyone alive today likely is aware of data breaches surrounding this country's most recent Presidential election. The Department of Labor, of which OFCCP is a part, was recently attacked with ransomware. The same has occurred at other government agencies and private businesses.[11]

Indeed, just last month, the Department of Labor suffered another compromise of its data, forcing the Department to shut down a portion of its website where employers report workplace injuries and illnesses, and further demonstrating the very real nature of this risk. *See* Siniscalco Decl., ¶ 12 Ex. B ("DOL Shuts Down Injury Reporting System Amid Possible Breach").

2. OFCCP Has Failed To Establish That A *Belaire* Notice Procedure Is Inappropriate Here.

Recognizing the privacy concerns inherent in the release of non-party employee contact information, federal courts routinely follow the *Belaire* notice procedure. *See, e.g.*, *Aldapa v. Fowler Packing*, 310 F.R.D. 583, 589 (E.D. Cal. 2015) ("Federal court have adopted the *Belaire* opt out procedure in employment class actions.") *Barreras v. Michaels Stores*, 2015 WL 1886337, at *5 (N.D. Cal. Apr. 24, 2015) (ordering *Belaire* notice); *Willner v. Manpower Inc.*, 2013 U.S. Dist. LEXIS 43821, at *7 (N.D. Cal. Mar. 27, 2013) (ordering *Belaire* procedure and ordering the plaintiff to bear the cost); *Murphy v. Target Corp.*, 2011 WL 2413439, at *4 (S.D. Cal. June 14, 2011) (ordering *Belaire* notice because "Target employees have a legally protected

[11] Despite OFCCP's argument that the *Google* decision is inapplicable, the reality is that these concerns are no less present here than they were in *Google* simply because OFCCP sought contact information for broader categories of employees in *Google* than it is seeking here.

privacy interest and a reasonable expectation of privacy in their contact information held by Target"); *Nguyen v. Baxter Healthcare Corp.*, 275 F.R.D. 503, 512 (C.D. Cal. 2011) (ordering *Belaire* notice); *see also In re Ins. Installment Fee Cases*, 211 Cal. App. 4th 1395, 1427 (2012) (recognizing that "*some* form of notice and opportunity to object to disclosure to a third party is required to protect the potential class members' privacy rights")

OFCCP argues that a *Belaire* procedure is unnecessary because the existing protective order and the Privacy Act adequately protect the privacy rights of third parties. But OFCCP ignores that the right to privacy is essentially "the right to be left alone." *Hill*, 7 Cal. 4th at 24. The affected former and current employees have not consented to Oracle disclosing their private information *to OFCCP* under any terms. Oracle has an obligation "to resist attempts at unauthorized disclosure" and the affected employees are entitled to expect that their "right[s] will be thus asserted." *Craig v. Municipal Court*, 100 Cal. App. 3d 69, 77 (1979); *see also Bd. of Trustees v. Superior Court*, 119 Cal. App. 3d 516, 526 (1981) ("[T]he custodian of such private information may not waive the privacy rights of persons who are constitutionally guaranteed their protection.").[12]

Moreover, frequently courts utilize a *Belaire* procedure in addition to an existing protective order in order to protect employee rights. *See, e.g., Aldapa*, 310 F.R.D. at 589, 592 (ordering *Belaire* procedure even though stipulated protective order was already in place); *Willner*, 2013 U.S. Dist. LEXIS, at *1 (N.D. Cal. Apr. 22, 2013) (ordering *Belaire* procedure even though protective order already in place because contact information sought included telephone numbers). The California Supreme Court has recently confirmed that a protective order and a *Belaire* procedure are not mutually exclusive, but complementary. *See Williams* at

[12] There is also no assurance OFCCP would even invoke the Privacy Rights Act to prevent disclosure of the private contact information to third parties, as the Department of Veterans Affairs did in the case OFCCP cites, *Williams v. Shinseki*, 161 F. Supp. 3d 91, 94 (D.D.C. 2012), and it is possible that one of the 12 enumerated exceptions to the Privacy Act would apply. OFCCP also cites two wholly distinguishable cases dealing with confidentiality protections applicable to *administrative subpoenas* in an *EEOC investigation* prior to litigation. Mot. at 18 (citing *EEOC v. Bay Shipbuilding Corp.*, 668 F. 2d 304 (7th Cir. 1981); *EEOC v. St. John Hosp. & Med. Ctr.*, 2012 WL 3887626 (E.D. Mich. June, 1 2012)). In fact, Title VII itself mandates that information obtained as part of an EEOC investigation cannot be made public, even pursuant to a FOIA request. That rule is not applicable here.

*15, n.10 ("Though it was not made part of the order here, trial courts may also ***supplement*** *Belaire-West* notices with a protective order prohibiting disclosure of any received contact information outside the confines of a specific lawsuit.") (emphasis added).

Indeed, the cases upon which OFCCP relies are distinguishable. In *Benedict v. HP Co.*, 2013 WL 3215186, at *2–3 (N.D. Cal. June 25, 2013), the court allowed production of a class list without a *Belaire* procedure, but the protective order had a "Highly Confidential Attorneys' Eyes Only" provision that applied to the class list. *Id.* at *2–3. There is no such provision in the protective order here, and OFCCP has made clear that it would never agree to such a provision. Similarly, in *Artis v. Deere & Co.*, 276 F.R.D. 348, 353 (N.D. Cal. 2011), the court ordered that the contact information was to be "produced to Plaintiff's counsel only and to be used only in this litigation." Additionally, *Artis* was an applicant-only class—there were no employees involved. Thus, concerns about workplace disruption, which Judge Berlin acknowledged in *Google*, were inapplicable. Further, the protective order at issue in *Wellens v. Daiichi Sankyo, Inc.*, 2014 WL 969692 (N.D. Cal. Mar. 5, 2014), specifically stated that the contact information could be used *only* for that case, and the plaintiff had to destroy or return it upon the final disposition of the case.[13] Neither protection exists here, as OFCCP openly acknowledges in its motion, when it explains it plans to share the data with other government agencies. Mot. at 19.

Finally, Oracle is not free to waive the privacy rights of thousands of its employees—many of whom will likely not want to participate—based solely on OFCCP's assumption that they could stand to benefit from the litigation. Unlike a class action, former and current Oracle employees will never be parties to this action and cannot elect out of participation in it unless given that opportunity through a *Belaire* notice procedure. Because there will be no certification

[13] OFCCP cites a handful of other cases as well to support the general proposition that the disclosure of contact information can be compelled. But Oracle is not refusing to produce any contact information whatsoever. The key point in all of these cases is that the facts of each case determine the appropriate safeguards for employee privacy. Even among the other cases cited by OFCCP, courts differ in their approach based on the circumstances of the individual case. *See, e.g.*, *Coleman v. Jenny Craig, Inc.*, 2013 WL 2896884 (S.D. Cal. June 12, 2013) (requiring a new protective order); *Salazar v. McDonald's Corp.*, 2016 WL 736213 (N.D. Cal. Feb. 25, 2016) (ordering disclosure under existing protective order while requiring plaintiff's counsel to inform contacted employees that the disclosure was compelled and imposing additional restrictions). Here a *Belaire* procedure is wholly appropriate.

procedure or adequacy review in this case, affected employees should be given the protection of an opt-out notice procedure before their private contact information is disclosed to a third party. A *Belaire* notice procedure is even more important here than in a traditional class action where employees would at some point in the litigation receive notice and an opportunity to opt out.[14]

3. The Scope of OFCCP's Request Is Overly Broad.

a. Contact Information From A Twenty Percent Sample Of Oracle Employees Will Provide OFCCP With The Information It Needs While Limiting Unnecessary Privacy Violations.

Oracle already has offered to disclose contact information for a 20 percent sample of the allegedly affected individual contributor employees (approximately 840 employees), and is now willing to increase that amount to 20 percent of the overall class (but consisting of only individual contributor class members). This 20 percent sample amounts to approximately 1,100 employees. Such a sample would provide OFCCP with more than enough opportunity to search for the "anecdotal" evidence it seeks while limiting the disclosure of private employee information.[15] Oracle's offer thus strikes a reasonable balance between OFCCP's needs and employee rights.

OFCCP has never articulated why it needs more than a 20 percent sample. Contact information beyond that number of individuals will not lead to the discovery of admissible

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[14] Although a *Belaire* notice should be required in this case for all the reasons explained above, in the event the Court disagrees and does not order a *Belaire* notice procedure, the contact information provided to OFCCP should not include the third parties' personal phone numbers and personal email addresses. *See Willner*, 2013 U.S. Dist. LEXIS 43821, at *5–7 ("Contact by telephone constitutes a more serious invasion of privacy because the putative class members cannot ignore a telephone call the same way they can ignore a solicitation that arrives by mail.") (citing *Tomassi v. City of Los Angeles*, 2008 WL 4722393, at *3–4 (C.D. Cal. Oct. 24, 2008) (denying motion to compel contact information to the extent the plaintiffs sought class members' telephone numbers and emails)); *see also Best Buy Stores, L.P. v. Superior Court*, 137 Cal. App. 4th 772, 778 (2006) (recognizing that privacy rights of putative class members in consumer class action made contact by mail more appropriate than contact either in person or by telephone). The cases OFCCP cites to suggest that personal phone and email contact information is not more sensitive than mailing addresses are inapposite. *See Sandres v. Corrs. Corp. of Am.*, 2011 WL 475068, at *4 (E.D. Cal. Feb. 4, 2011) (dispute regarding contact information for only *14 percipient witnesses* and involving protective order that restricted access to the information to plaintiff's counsel and his staff members/process server on a "need to know basis"); *Robinson v. Chef's Warehouse*, 2017 WL 836943, at *1 (N.D. Cal. Mar. 3, 2017) (putative class of only 100 individuals where parties initially agreed on *Belaire* procedure, but defendant reneged and resisted production of contact information altogether).

[15] A sample size of 1,100 employees is also sufficient to ameliorate any concern that Oracle would be able to identify the specific employees contacted by OFCCP.

information because OFCCP will never be able to interview even that many people. Federal courts regularly limit the production of private contact information to smaller or comparable sample sizes. *See, e.g.*, *Murphy*, 2011 WL 2413439, at *2 (granting request for contact information as to only 10 percent of defendant's California stores); *Roberts v. C.R. England, Inc.*, 2013 WL 3893987, at *4 (D. Utah July 26, 2013) (ordering a "representative sample of the contact information for the current and former employees that are the subject of these requests consisting of 8% of the total."); *Aldapa*, 310 F.R.D. at 589 (ordering production of contact information limited to select employees plus approximately 25 percent of employees that fall within the putative class). In *OFCCP v. Google*, Judge Berlin concluded that a 20 percent sample was sufficient.[16]

b. Production Of Managers' Contact Information Is Improper.

In addition to the privacy concerns already noted, OFCCP's demand that Oracle turn over contact information for its managerial employees raises a separate issue: namely, that by virtue of their position, managerial employees may speak for their employer. *See Orlowski v. Dominick's Finer Foods*, 937 F. Supp. 723, 728 (N.D. Ill. 1996) (managers and co-managers that "make many of the fundamental employment decisions, such as hiring, scheduling work shifts, and recommending terminations," were managerial employees for purposes of the rule forbidding *ex parte* contact). As a result, any *ex parte* communications between OFCCP and these employees would be fundamentally unfair to Oracle, which could potentially be legally bound by the statements of its managers.

Although Oracle's concerns are not limited to potential conflicts with the Rules of Professional Conduct as OFCCP suggests, it is true that *ex parte* contact with Oracle managers would likely run afoul of professional ethics rules barring direct contact between OFCCP

[16] OFCCP has never attempted to explain why 20 percent is an insufficient sample. Instead, OFCCP has offered only one single exclusion, Thomas Kurian, Oracle's President of Product Development, who is among Oracle's alleged "victims." Yet Oracle's primary concerns are with the protection of its employee's personal information, as well as the significant disruption to Oracle's relationship with its employees due to a loss of trust, both of which Judge Berlin recognized in *Google* when ordering a sample there. Excluding only the President of Product Development does not alleviate these concerns.

counsel and a represented party. *See* Cal. Rule of Prof'l Conduct 2-100(A).[17] Courts have recognized this danger and either rejected or strictly conditioned production of contact information for managerial employees. *See, e.g., Hobson v. Commc'ns Unlimited*, 2011 WL 414948, at *2 (N.D. Ga. Feb. 7, 2011) (limiting production to names, and not contact information, of managers and independent contractors); *OFCCP v. American Airlines*, Case No. 1994-OFC-9 (ALJ, Jan. 19, 1995) (denying OFCCP's motion to compel production of telephone numbers for employees "with authority to bind company", but ordering the production of addresses "for the limited purpose of noticing depositions"). At a minimum, any production of contact information for managerial employees should be accompanied by instructions from the Court prohibiting *ex parte* communications. *Doyon v. Rite Aid*, 279 F.R.D. 43, 51 (D. Me. 2011) (finding a protective order necessary to control communications).

OFCCP asserts two arguments against limiting the disclosure of contact information to individual contributors: (1) that Oracle has "offer[ed] no evidence that all non-individual contributors are subject to the rule;" and (2), that barring discovery of such contact information would "heap a tremendous additional burden" on the Court. Mot., at 15. The former is a red herring—the rule itself, and the cases interpreting it, define its application and do not require supporting "evidence," and as explained *supra*, the rule applies not only to high-level employees, but to any employee who could bind their employer with their statements. The latter is hyperbole; no burden whatsoever will be imposed on the Court.[18]

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[17] Under Cal. Rule of Prof'l. Conduct 2-100(B), managerial employees may qualify as a "party" either by being an "officer, director, or managing agent of a corporation," or as "an employee of [a] . . . corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization. . ." This rule combines the "control group" and "managing-speaking" agent tests utilized in various jurisdictions. *See Palmer v. Pioneer Inn Assocs.*, 118 Nev. 943 (2002) (describing tests). While some Oracle managers may fall within the "control group" of high-level officers, directors, and managing agents, all could potentially be held to bind Oracle with their statements, and are therefore subject to the protections of the rule. *See United States v. Sierra Pac. Indus.*, 857 F. Supp. 2d 975, 980–91 (E.D. Cal. 2011) (finding party violated Rule 2-100 where it contacted two federal employees whose "statements might constitute admissions on the part of the United States," despite their alleged lack of the "requisite level of authority.")

[18] The language quoted by OFCCP regarding this tremendous burden is related to the denial of a protective order prohibiting plaintiff's counsel from improperly soliciting new clients from the list of claimants disclosed by defendant. *Colonial Life & Accident Ins. Co. v. Superior Court*, 31 Cal. 3d 785, 793 (1982). Affirmatively enforcing improper solicitation is clearly a more serious burden on the court than exercising its inherent power to control the scope of discovery.

4. OFCCP Should Be Required To Provide Appropriate Disclaimers.

OFCCP should also be required to give a disclaimer when it contacts Oracle's employees. Numerous courts have recognized that employees' privacy concerns are best protected where the contacting party is required to inform each contacted employee (1) that the individual has a right not to speak to plaintiff's counsel, (2) that if the individual indicates they do not want to speak to counsel, counsel will terminate the contact and not contact them again, and (3) that their employer was compelled by the court to disclose their contact information. *Benedict*, 2013 WL 3215186, at *3; *Frieri v. Sysco*, 2017 WL 2908777, at *5 (S.D. Cal. July 7, 2017); *Finder v. Leprino Foods*, 2017 WL 1272350, at *6 (E.D. Cal. Jan. 20, 2017). Even the cases on which OFCCP relies include specific orders directed at the plaintiffs to whom employee contact information is provided regarding what they must say when they contact employees. *See Bell v. Delta Air Lines*, 2014 WL 985829 (N.D. Cal. Mar. 7, 2014). Oracle requests that any contacts between OFCCP and Oracle's employees be subject to these requirements.

IV. CONCLUSION

For the reasons set forth above, Oracle respectfully requests that the Court reject OFCCP's proposal for an impossible production schedule and deny OFCCP's motion to compel.

Respectfully submitted,

August 25, 2017

GARY R. SINISCALCO
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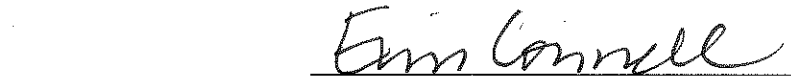

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